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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RONNELL ROBIN DUNN, Defendant and Appellant.	D073799 (Super. Ct. No. SCE374204)

APPEAL from a judgment of the Superior Court of San Diego County, Herbert J. Exarhos, Judge. Reversed in part, affirmed in part, remanded with directions.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Warren Williams, and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, Dunn was convicted of carjacking (Pen. Code, § 215, subd. (a), count one),[1] robbery (§ 211, count two), and possession of a firearm by a felon (§ 29800, subd. (a)(1), count three). As to counts one and two, the jury found true the allegation that Dunn personally used a firearm within the meaning of sections 12022.5, subdivision (a) and 12022.53, subdivision (b). Dunn admitted to a prior serious felony conviction (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)) that also constituted a strike (§§ 667, subd. (b)-(i), 1170.12, 668). Dunn was subsequently sentenced to prison for 20 years, four months.

Dunn contends his convictions should be reversed because the prosecutor improperly vouched for the government's case and his counsel was ineffective in failing to object. Dunn further contends if his convictions are not reversed, his $39 criminal theft fine should be stricken, and his case should be remanded for resentencing under Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1-2) which amends sections 667 and 1385 to give trial courts discretion to strike five-year sentencing enhancements for prior serious felony convictions. The amendments are effective January 1, 2019.

We reject Dunn's prosecutorial misconduct and ineffective assistance of counsel arguments. We reverse the sentence and remand the matter for resentencing pursuant to sections 667 and 1385, as amended by Senate Bill 1393 after January 1, 2019. At that time, the trial court shall modify the abstract of judgment to reflect the correct amount for

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1 All further statutory references are to the Penal Code unless otherwise specified.

the criminal theft fine pursuant to section 1202.5 ($10), and separately list the additional penalty assessments and surcharge set forth *post*, for a total obligation of $41.

FACTUAL AND PROCEDURAL BACKGROUND

On June 22, 2017, at approximately 9:00 p.m., Dunn and two accomplices robbed and carjacked L.J. and C.W. at gunpoint.[2] Earlier in the evening L.J. picked up C.W. in his white 2016 Honda Accord and drove to a park to smoke a marijuana cigarette. L.J. and C.W. took a walk around the park, shared the marijuana cigarette, and then returned to the Honda. As they returned, L.J. noticed a dark-colored car with three Black male occupants parked a few spots away. As L.J. opened the door to his Honda he was confronted by an assailant, later identified as Dunn, who approached him and placed a gun to his chest. Dunn demanded L.J. surrender his wallet, car, money, and phone. L.J. initially resisted by pushing Dunn, but then complied with Dunn's demands after Dunn again threatened him with his gun.

At the same time, C.W. was confronted by an accomplice on the passenger's side of the Honda. C.W. felt a gun at his back as he was about to enter the Honda. The gunman demanded C.W. turn over all his valuables. After initially "freez[ing]," C.W. complied.

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[2] For purposes of this section, we state the evidence in the light most favorable to the judgment. (See *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Dawkins* (2014) 230 Cal.App.4th 991, 994.)

After the robbery, the assailants told L.J. and C.W. to move away from the parking lot and head toward the park. While moving into the park, L.J. and C.W. observed the dark-colored car and the Honda drive away.

L.J. and C.W. sought help from individuals at the park. L.J. borrowed a cell phone and reported the incident to 911. L.J. stated that he was robbed, his car was stolen, and he also provided a description of Dunn. L.J. described Dunn as a Black male, 30 to 35 years old, short, a "little chubby," wearing a black shirt and brown or camouflage pants. L.J. continued to speak with the 911 operator until police arrived at the park.

Police later found L.J.'s car and L.J. retrieved it from the tow yard the next day. L.J. then drove to a gas station. When L.J. arrived at the gas station, he recognized Dunn walking near the gas pumps—about 12 to 15 feet away—and he saw the dark-colored car from the previous night's robbery. When L.J. and Dunn made eye contact, Dunn mouthed the words, "What's up, motherfucker?" L.J. then tried to chase down Dunn, but he was unsuccessful. L.J. returned to the gas station and took a photograph of Dunn's car before a female passenger moved to the driver's seat and drove away.

L.J. sent the photograph of the car to the police. Officers used the license plate from the photograph to check for previous law enforcement contacts. That check revealed the car from the photograph had been stopped by an officer for speeding at approximately 7:50 p.m. on June 22, 2017. The officer issued a citation to the driver, who identified himself as Dunn using a California identification card and temporary driver's license. Dunn signed the citation with his left hand.

Officers used the information from the speeding citation to compose a photographic lineup. When this photographic lineup was presented to L.J., he identified Dunn as the assailant from the park.

Dunn was subsequently arrested and brought to trial. At trial, Dunn argued that the descriptions given by the witnesses were inaccurate and insufficient to identify him as the assailant. Dunn further argued the body camera footage from the traffic stop, showing Dunn signing the ticket with his left hand, indicates Dunn would likely have used his left hand to control the gun and not his right as described by L.J. The jury convicted Dunn on all three charges.

DISCUSSION

I

Prosecutorial Misconduct

Dunn contends the prosecutor committed misconduct by "impermissibly vouching for the appropriateness of a guilty verdict." Anticipating the Attorney General's forfeiture argument, Dunn further contends his counsel rendered ineffective assistance by failing to object to the prosecutor's remark. We reject both of Dunn's claims.

A. *Governing Legal Principles*

The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214 (*Gionis*).) "Prosecutorial misconduct that falls short

of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury." (*People v. Panah* (2005) 35 Cal.4th 395, 462 (*Panah*).)

The standard of appellate review for assessing prejudice depends on whether the prosecutorial misconduct amounts to federal constitutional error, or state law error. If federal constitutional error is established, we apply the *Chapman* standard and decide whether the error is harmless beyond a reasonable doubt. (See *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1106-1107, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) If the error does not rise to that level, we apply the *Watson* standard and determine if there is a "reasonable probability that the jury would have reached a more favorable result absent the objectionable comments." (*People v. Sandoval* (1992) 4 Cal.4th 155, 184; see *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The prosecutor has wide latitude to make vigorous arguments, as long as those arguments amount to fair comment on the evidence, including reasonable inferences or deductions drawn from the evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 732.) However, a prosecutor is prohibited from improperly vouching for the government's case. "Improper vouching occurs when the prosecutor either (1) suggests that evidence not available to the jury supports the argument, or (2) invokes his or her personal prestige or depth of experience, or the prestige or reputation of the office, in support of the argument." (*People v. Anderson* (2018) 5 Cal.5th 372, 415 (*Anderson*).) "Nor may prosecutors offer their personal opinions when they are based solely on their experience

or on other facts outside the record." (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207 (*Huggins*).)

"[W]hen the claim [of prosecutorial misconduct] focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) We evaluate the prosecutor's statements in the context of the whole record (*People v. Centeno* (2014) 60 Cal.4th 659, 667 (*Centeno*)), and "we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970 (*Frye*), overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 (*Doolin*).)

"To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury." (*People v. Brown* (2003) 31 Cal.4th 518, 553.)

B. *Additional Factual Background*

During closing argument, the prosecutor made the following remarks, the italicized portion of which Dunn contends constitutes prosecutorial misconduct:

> "Which brings us down to the core issue of this case. Did Mr. Dunn do these crimes? [¶] *Obviously, I believe he did or I wouldn't be here telling you these things*, but let's look at the evidence. [L.J.'s] identification of Mr. Dunn is solid. [L.J.] sat there for about 45 minutes last Thursday and told you exactly what happened, what he remembers. He was hit with prior statements he made." (Italics added.)

The prosecutor then went on to discuss, in detail, the evidence supporting the government's case. The prosecutor described consistencies in L.J.'s prior statements and prior and current testimony. The prosecutor discussed C.W.'s testimony and the other, extensive evidence introduced at trial. Concluding his closing argument, the prosecutor stated, "Ladies and gentlemen, this is proof beyond a reasonable doubt. . . . [¶] Ladies and gentlemen, that's the guy. And I'm sure when we give you the chance today after we're done giving [our] closing arguments, you will agree that Mr. Dunn is guilty of these three crimes beyond a reasonable doubt."

Dunn's counsel failed to object to any of the prosecutor's closing argument.

C. *Analysis*

We conclude Dunn forfeited his claim of prosecutorial misconduct by failing to object to the prosecutor's remark at trial and failing to request a jury admonition. (See *People v. Redd* (2010) 48 Cal.4th 691, 746 [requiring objection and request for jury admonition to preserve prosecutorial misconduct claim].) Because "any harm could easily have been cured, the contentions [of prosecutorial misconduct] are not cognizable on appeal." (*People v. Carpenter* (1997) 15 Cal.4th 312, 396, abrogated on another ground as stated in *People v. Diaz* (2015) 60 Cal.4th 1176, 1189-1190.)

Even if Dunn's claim had not been forfeited, we would conclude the prosecutor's brief and fleeting remark, followed immediately by a detailed discussion of the evidence, did not constitute prosecutorial misconduct. "A prosecutor may not express a personal opinion or belief in the guilt of the accused when there is a substantial danger that the jury will view the comments as based on information other than evidence adduced at

trial." (*People v. Mincey* (1992) 2 Cal.4th 408, 447.) However, it is not error for a prosecutor to state a belief that a defendant is guilty when that comment is immediately followed by a discussion of the evidence. (*People v. Lopez* (2008) 42 Cal.4th 960, 971 (*Lopez*).)

Here, immediately following the remark in question, the prosecutor summarized the evidence supporting a conviction. The prosecutor discussed L.J.'s identification of Dunn from the robbery; L.J.'s identification of the car Dunn was seen in before, during, and after the robbery; L.J.'s encounter with Dunn at the gas station; L.J.'s identification of Dunn in a photographic lineup; the officer's body camera footage placing Dunn in the car identified at both the robbery and the gas station; as well as the testimony of officers and the other robbery victim. Because the prosecutor was giving his opinion by reference to evidence introduced at trial—and was not vouching for the strength of the government's case based on personal beliefs derived from matters *outside* the record—no misconduct occurred. (See *People v. Medina* (1995) 11 Cal.4th 694, 757-758 [prosecutor's statement he " 'would not deceive' " the jury was not improper when the statement related to evidence presented to the jury]; see also *Huggins*, *supra*, 38 Cal.4th at pp. 206-207 [no misconduct based on prosecutor's remarks stating " 'Please believe me. [Defense counsel] has lied through his teeth in trying to sell this story to you,' " because "[i]t is not . . . misconduct to ask the jury to believe the prosecution's version of events as drawn from the evidence"].)

We acknowledge it was less than ideal for the prosecutor to state, "I believe [Dunn] did [commit the crimes] or I wouldn't be here telling you these things . . . ." But

we have to consider this remark in the context of the whole record, including the qualifying language that immediately followed, i.e., "but let's look at the evidence." Taken as a whole, the prosecutor's closing argument did not invite the jury to convict Dunn based on the prosecutor's personal beliefs or the prestige of his office. (See *Anderson, supra,* 5 Cal.5th at p. 415 [no improper vouching where prosecutor stated, " 'I believe with all my heart that I've provided you with the evidence to prove' " defendant's guilt].) Dunn has failed to show any reasonable likelihood that the jury construed or applied the remark at issue in an objectionable fashion, and we do not infer the jury drew the most damaging meaning from this statement. (*Frye*, 18 Cal.4th at p. 970.) Rather than relying on personal beliefs based on facts not in evidence, the prosecutor expressly linked his comments to the evidence. On this record, we cannot conclude that the prosecutor's remark infected the trial with such unfairness that it violated Dunn's federal constitutional rights (*Gionis, supra,* 9 Cal.4th at p. 1214), or that his statement constituted a deceptive or reprehensible method of attempting to persuade the jury in violation of the state Constitution. (*Panah, supra,* 35 Cal.4th at p. 462.)

Even if we were to find error, there was no prejudice. First, Dunn complains of a single, brief comment by the prosecutor. (See *Anderson, supra,* 5 Cal.5th at p. 415 ["To the extent the prosecutor's language, 'I believe with all my heart,' could be viewed as invoking his personal prestige or depth of experience, the brief remark could not have been prejudicial."].) Particularly where the objected to comment is followed by a discussion of the evidence, as here, no prejudice results. (*People v. Sully* (1991) 53 Cal.3d 1195, 1236 [finding "no conceivable prejudice" to defendant where "a remark

that the prosecutor had not deceived the jury and would not lie to it—was brief, innocuous, and followed immediately by references to evidence bearing on witness credibility"].) Second, the court instructed the jury that arguments of counsel are not evidence. We presume the jury followed these instructions. (*Doolin*, *supra*, 45 Cal.4th at p. 444.) Finally, the evidence of Dunn's guilt was overwhelming. After being held up at gunpoint by Dunn, L.J. recognized the defendant at a gas station the next day—where Dunn made eye contact with L.J. and mouthed "What's up, motherfucker?" before running away when L.J. unsuccessfully chased after him. L.J. returned to the gas station and took a photograph of Dunn's car, and then provided the information to the police, leading to Dunn's arrest. L.J. then identified Dunn from a photographic lineup. Based on this record, we reject Dunn's claim that the prosecutor's brief remark had any effect on the verdict.

II

Ineffective Assistance of Counsel

As already discussed, a claim of prosecutorial misconduct is preserved for appeal only if the defendant makes a timely objection and requests an admonition to cure any alleged harm. (*Centeno*, *supra*, 60 Cal.4th at p. 674; *People v. Thornton* (2007) 41 Cal.4th 391, 454.) However, "[a] defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel." (*Lopez*, *supra*, 42 Cal.4th at p. 966.) Recognizing his claim of prosecutorial misconduct was forfeited

because there was no objection, Dunn alternatively contends his counsel rendered ineffective assistance by failing to object.

To prevail on an ineffective assistance of counsel claim, Dunn "bears the burden of showing by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice." (*Centeno*, *supra*, 60 Cal.4th at p. 674; see *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).)

Because we have concluded no prosecutorial misconduct occurred, the failure of Dunn's counsel to object did not constitute ineffective assistance of counsel. (*People v. Lucas* (1995) 12 Cal.4th 415, 494 ["failure to object was not ineffective assistance of counsel, as no prejudicial prosecutorial misconduct occurred"].) On direct appeal, we " 'will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' " (*People v. Zapien* (1993) 4 Cal.4th 929, 980.) Here, where the prosecutor's remark was brief and immediately followed by a discussion of the evidence, defense counsel could have made a rational tactical decision not to object. (See *People v. Maury* (2003) 30 Cal.4th 342, 419 ["[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance."].) Even assuming reasonable counsel would have objected and the court would have provided an admonition, there is no reasonable probability that the result in this case would have been different. (*Strickland*, *supra*, 466 U.S. at p. 694 ["A reasonable probability is a probability

sufficient to undermine confidence in the outcome."].) Given the overwhelming evidence of Dunn's guilt, Dunn suffered no prejudice by his counsel's failure to object to the prosecutor's remark.[3]

III

Criminal Theft Fine[4]

Dunn contends his $39 criminal theft fine should be stricken for two reasons: (1) the fine was not orally imposed at sentencing, and the court's oral pronouncement controls over the abstract of judgment; and (2) the trial court ordered all non-mandatory fees and fines to be stricken, and the criminal theft fine is discretionary because it is based on a defendant's ability to pay. The Attorney General contends the fine is mandatory pursuant to section 1202.5, the correct amount is $41 (rather than $39), and this court should modify the abstract of judgment to reflect that correct amount.

A. *Governing Legal Principles*

Generally, "[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385; see *People v. Mitchell*

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3 Dunn also contends the cumulative prejudice of the prosecutor's misconduct and his counsel's ineffective assistance warrants reversal of his convictions. We have rejected Dunn's claims of misconduct and ineffective assistance of counsel. Whether viewed individually or in combination, Dunn has not established prejudicial error. (*People v. Martinez* (2003) 31 Cal.4th 673, 704.)

4 Dunn challenges the criminal theft fine under section 1202.5, and no other aspects of the trial court's imposition of fines, fees, penalties, or assessments on appeal. We confine our analysis of error to this fine.

(2001) 26 Cal.4th 181, 185-186 (*Mitchell*) [appellate court has the authority to order the abstract of judgment to be corrected if it does not accurately reflect the trial court's oral pronouncement of judgment]; *People v. Mesa* (1975) 14 Cal.3d 466, 471 ["a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error"].)

Certain fees, fines, or assessments are imposed during sentencing by the trial court—some are mandatory, and others are discretionary. We briefly summarize the ones reflected in the abstract of judgment here. Section 1202.4, subdivision (b)(1) specifies that a restitution fine shall be set at the court's discretion and shall not be less than $300 and not more than $10,000 for felonies. (§ 1202.4, subd. (b)(1).) A restitution fine is mandatory, unless the sentencing court finds compelling and extraordinary reasons for not imposing the fine and states those reasons on the record. (§ 1202.4, subd. (b); *People v. Tillman* (2000) 22 Cal.4th 300, 302.)

Penal Code section 1465.8 mandates that the trial court impose a $40 assessment for every conviction "[t]o assist in funding court operations." (Pen. Code, § 1465.8, subd. (a).) Government Code section 70373 requires the trial court to impose a $30 assessment on every felony conviction "[t]o ensure and maintain adequate funding for court facilities." (Gov. Code, § 70373, subd. (a)(1).) Both of these assessments are mandatory, and they apply to each conviction, i.e., each count of which a defendant is convicted. (Pen. Code, § 1465.8, subd. (a)(1); Gov. Code, § 70373, subd. (a)(1); see also *People v. Alford* (2007) 42 Cal.4th 749, 754 [Pen. Code, § 1465.8 court operations assessment is mandatory for all convictions]; *People v. Cortez* (2010) 189 Cal.App.4th

1436, 1439, 1442 [Gov. Code, § 70373 assessment was properly applied to each of defendant's convictions].)

The trial court may impose a "criminal justice administrative fee," otherwise known as a booking fee, pursuant to Government Code section 29550, et seq. "Three statutes address defendants' payment of jail booking fees, Government Code sections 29550, 29550.1, and 29550.2. Which section applies to a given defendant depends on which governmental entity has arrested a defendant before transporting him or her to a county jail." (*People v. McCullough* (2013) 56 Cal.4th 589, 592.) Because the City of San Diego was the arresting agency in this case, Government Code section 29550.1 would apply. Government Code section 29550, subdivision (a) authorizes a county to impose on certain public entities, including cities, a fee reflecting 50 percent of the cost incurred in booking an arrestee into county jail when the arrest is effected by the other entity. The county may recover half its cost by submitting an invoice to the arresting entity. (*Ibid*.) The arresting agency, in turn, may recover the booking fee from the arrestee if the arrestee is convicted of a criminal offense related to the arrest. (Gov. Code, § 29550.1.) "When the court has been notified . . . that a criminal justice administration fee is due the agency: . . . [¶] A judgment of conviction may impose an order for payment of the amount of the criminal justice administration fee by

the convicted person . . . ." (Gov. Code, § 29550, subd. (d)(1).)[5] The booking fee for San Diego County is $154. (See San Diego County Code Reg. Ord., § 34.103.)

Section 1202.5 imposes on a defendant convicted of robbery or other specified crimes "a fine of ten dollars ($10) in addition to any other penalty or fine imposed." (§ 1202.5, subd. (a).) The trial court may select an amount less than $10 as the base fine, or impose no fine at all, based on the defendant's ability to pay. (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1530 (*Castellanos*).)[6] If the trial court imposes a base fine under section 1202.5, additional assessments, penalties, and a surcharge are also required.

For a Penal Code section 1202.5 fine of $10, the total amount due would be $41, i.e., the base amount of $10 plus $31 for the following: (1) a $10 penalty assessment (Pen. Code, § 1464, subd. (a)(1)); (2) a $7 penalty assessment (Gov. Code, § 76000, subd. (a)(1)); (3) a $2 penalty assessment (Gov. Code, § 76000.5, subd. (a)(1)); (4) a $2 state surcharge, calculated at 20 percent of the base fine (Pen. Code, § 1465.7, subd. (a));

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[5] By contrast, the trial court is required to impose a booking fee if probation is granted and if the defendant has the ability to pay. (Gov. Code, § 29550, subd. (d)(2) ["The court shall, as a condition of probation, order the convicted person, based on his or her ability to pay, to reimburse the county for the criminal justice administration fee, including applicable overhead costs."].)

[6] The statute provides in relevant part: "If the court determines that the defendant has the ability to pay all or part of the fine, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability. In making a determination of whether a defendant has the ability to pay, the court shall take into account the amount of any other fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution." (§ 1202.5, subd. (a).)

(5) a state court construction penalty of $5 (Gov. Code, § 70372, subd. (a)(1)); (6) a $1 DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)); and (7) a $4 DNA state-only penalty (Gov. Code, § 76104.7, subd. (a)). (See *People v. Knightbent* (2010) 186 Cal.App.4th 1105, 1109 (*Knightbent*).)

A trial court's determination regarding a defendant's ability to pay fines and fees can be express or implied. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1516-1517 (*Martinez*).) "Ability to pay does not necessarily require existing employment or cash on hand." (*People v. Staley* (1992) 10 Cal.App.4th 782, 785 (*Staley*).) The trial court may consider the defendant's future ability to pay, including his ability to earn wages while in prison. (*People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1377 (*Ramirez*).)

When the trial court imposes a section 1202.5 fine, we can presume the trial court implicitly found defendant had the ability to pay the fine. (See *Ramirez*, *supra*, 39 Cal.App.4th at p. 1377 [trial court made implied finding regarding defendant's ability to pay restitution]; cf. *Castellanos*, *supra*, 175 Cal.App.4th at p. 1531 [trial court made implied finding regarding defendant's ability to pay $10 base fine under § 1202.5, but not additional amounts].) Conversely, the failure of the trial court to orally impose the section 1202.5 fine is presumed to result from a finding that defendant lacked the ability to pay the fine. (See *People v. Sharret* (2011) 191 Cal.App.4th 859, 864 [in cases where the record is silent and there is an ability to pay provision, "we presume the trial court found [the] defendant did not have the ability to pay"].)

B. *Additional Factual Background*

At the beginning of the sentencing hearing, the trial court indicated it had read and considered the probation officer's report and "statements in mitigation."

The probation officer recommended that Dunn pay the following:

> "[1.] Restitution fine pursuant to [Penal Code section] 1202.4(b) in the amount of $10,000.
>
> "[2.] Additional restitution fine pursuant to [Penal Code section] 1202.45 in the amount of $10,000.00 to be stayed and remain so unless defendant's supervision is revoked.
>
> "[3.] Court Security Fee pursuant to [Penal Code section] 1465.8 in the amount of $120.00.
>
> "[4.] Immediate Critical Needs Account (ICNA) fee pursuant to [Government Code section] 70373 in the amount of $90.00.
>
> "[5.] Criminal Justice Administration Fee pursuant to [Government Code section] 29550.1 in the amount of $154.00.
>
> "[6.] *Theft fine pursuant to* [*Penal Code section*] *1202.5 in the amount of $39.00, including penalty assessment, for payment to SDSO law enforcement agency*.
>
> "[7.] Restitution per [Penal Code section] 1202.4(f) to the [victim], in an amount to be determined by the court." (Italics added.)

Defendant's "statement in mitigation" did not address the issue of fines, fees, or penalty assessments.

After hearing from the defendant and the People, the trial court imposed a sentence of 20 years and four months, awarded 220 days credit, and then turned to the issue of fines.

> "The court: . . . [¶] Then we get into the fines on page 18 of the probation officer's report. The restitution fine will be in the amount of $1,000 rather than $10,000.
>
> "[Defense counsel]: Thank you, your honor.
>
> "The court: The next one [additional restitution pursuant to section 1202.45] is stayed.
>
> "[Defense counsel]: Your honor, can it be stayed at $1,000, please?
>
> "The court: Yes.
>
> "[Defense counsel]: Thank you.
>
> "The court: *To the extent that the others are mandatory, they will be imposed. To the extent that they are discretionary, they will be satisfied by his time in custody*." (Italics added.)

There was no further discussion on the issue of fines.

The abstract of judgment identifies the following restitution orders: (1) $1,000 pursuant to Penal Code section 1202.4, subd. (b); (2) $1,000 pursuant to Penal Code section 1202.45, suspended unless parole is revoked; and (3) restitution to the victim, in an amount to be determined, pursuant to Penal Code section 1202.4, subd. (f). The abstract of judgment further reflects imposition of the following fines and assessments: (1) $39 pursuant to Penal Code section 1202.5; (2) $120 pursuant to Penal Code section 1465.8; (3) $90 pursuant to Government Code section 70373; and (4) $154 pursuant to Government Code section 29550—for a total of $403. The court minutes reflect imposition of the same restitution orders, fines, and assessments.

C. Analysis

We reject Dunn's request to strike the criminal theft fine in this case. Although the oral pronouncement governs when it deviates from the abstract of judgment (*Mitchell*,

supra, 26 Cal.4th at p. 185), we conclude there is no discrepancy after considering the entire record and the court's implied finding regarding Dunn's ability to pay. However, because there was a $2 error in how the total criminal theft fine was calculated (including the base fine, penalties, assessments, and surcharge), we order the abstract of judgment to be corrected in that regard.

All fines and fees must be reflected in the abstract of judgment. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200.) Here, the abstract of judgment documents the fines, fees, and assessments imposed by the trial court, by reference to the total amount imposed and the statutory basis for each. For example, the abstract of judgment lists $120 for "[c]ourt [o]perations [a]ssessment . . . per [Penal Code section] 1465.8" (which requires the trial court to impose $40 per conviction), and $90 for a "[c]onviction [a]ssessment . . . per [Government Code section] 70373" (which requires the trial court to impose $30 per conviction). Although the calculation for these assessments was not reflected in the abstract of judgment, it is apparent how the amounts were determined ($40 multiplied by three convictions, and $30 multiplied by three convictions), and the aggregate amounts of $120 and $90 were also included in the probation report.

Similarly, the abstract of judgment lists the total amount imposed pursuant to Penal Code section 1202.5, rather than identifying the base fine and itemizing the associated penalties, assessments, and surcharge as would be the better practice. (See *People v. Hamed* (2013) 221 Cal.App.4th 928, 940 ["By itemizing and listing the component parts of base fines and penalty assessments prior to sentencing, the parties would have an opportunity to identify and correct errors in the trial court, avoiding

unnecessary appeals. A detailed list would also prompt a sentencing court to take appropriate steps when a fine has an ability-to-pay requirement."].) Nonetheless, it is apparent the trial court was utilizing a base fine of $10. As detailed *ante*, a $10 base fine under Penal Code section 1202.5 would result in the following additional amounts: $10 pursuant to Penal Code section 1464, subd. (a)(1); $7 pursuant to Government Code section 76000, subd. (a)(1); $2 pursuant to Government Code section 76000.5, subd. (a)(1); $5 pursuant to Government Code section 70372, subd. (a)(1); $1 pursuant to Government Code section 76104.6, subd. (a)(1); and $4 pursuant to Government Code section 76104.7, subd. (a). Combined with the $10 base fine, these assessments and penalties equal the $39 reflected in the abstract of judgment. However, the court was also required to include the $2 state surcharge pursuant to Penal Code section 1465.7, subd. (a). Combined with the $10 base fine, these assessments, penalties, and surcharge total $41 (not $39).

While the failure to impose these types of penalty assessments and surcharges results in an unlawful sentence which is correctable at any time, the courts are split on what action to take. (*People v. Johnson* (2015) 234 Cal.App.4th 1432, 1458-1459.) "[S]ome courts have concluded that when a fine has an ability to pay provision, and when the reviewing court imposes penalty assessments greater than what was originally imposed, the matter should be remanded to the trial court for a determination of whether the defendant has the ability to pay the newly imposed amount." (*Id.* at p. 1458; see *Castellanos, supra,* 175 Cal.App.4th at pp. 1531-1532; see also *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249-1250.) Conversely, other courts have held

" '[n]either justice nor common sense justifies further expense to conduct a hearing on defendant's ability to pay, absent any indication that [he] lacks the ability to pay,' particularly if the increased amount is minimal." (*Johnson*, at p. 1458; see *Knightbent*, *supra*, 186 Cal.App.4th at pp. 1112-1113; see also *People v. Stewart* (2004) 117 Cal.App.4th 907, 910-911.) Given the nominal disparity of $2 at issue here, we direct that the abstract of judgment be corrected to reflect imposition of a criminal theft fine of $41 (rather than $39) pursuant to section 1202.5. (*Knightbent*, at pp. 1112-1113; *Stewart*, at pp. 910-911.)

We acknowledge that, during the oral pronouncement of judgment, the trial court did not expressly reference Penal Code section 1202.5. But we do not believe this is a situation where the trial court was completely silent in failing to impose a Penal Code section 1202.5 fine. Rather, the trial court here referred to the probation report's list of fines—a list that expressly included "[t]heft [f]ine pursuant to [Penal Code section] 1202.5 in the amount of $39.00"—and then stated it would impose those listed fines that were mandatory. After the trial court notified the parties it would determine which fines were mandatory, the court minutes and the abstract of judgment were prepared, documenting the trial court's determination. The abstract of judgment includes a $120 assessment pursuant to Penal Code section 1465.8 and a $90 assessment pursuant to Government Code section 70373, both of which are mandatory. Similarly, the abstract of judgment includes a Penal Code section 1202.5 fine. The statutory language of Penal Code section 1202.5 makes clear the criminal theft fine is required to be assessed if the court determines that the defendant has the ability to pay. Because the trial court was not

required to make an *express* finding regarding Dunn's ability to pay, we conclude the trial court made an *implied* finding, and then directed preparation of the minutes and abstract of judgment. (*Martinez, supra,* 65 Cal.App.4th at pp. 1516-1517.)[7]

In sum, we conclude the trial court properly imposed a criminal theft fine under section 1202.5, after making an implied finding of Dunn's ability to pay, but the court erred in calculating the total obligation due. After resentencing as discussed *post,* the trial court shall modify the abstract of judgment by striking the erroneous theft fine of $39 pursuant to section 1202.5, and replacing it with the appropriate fine and required penalty assessments and surcharge.

IV

Resentencing Pursuant to Sections 667 and 1385, as Amended by Senate Bill 1393

When Dunn was convicted, the trial court imposed a five-year enhancement as required by section 667 subdivision (a)(1).

Dunn contends if his convictions stand, the case should be remanded for resentencing pursuant to sections 667 and 1385, as amended by Senate Bill 1393, which is effective January 1, 2019. That statute amends sections 667 and 1385 to allow the trial court to exercise discretion to strike a formerly mandatory five-year enhancement

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7 There was substantial evidence to support the trial court's implied finding regarding Dunn's ability to pay. (*Staley, supra,* 10 Cal.App.4th at p. 785; *Ramirez, supra,* 39 Cal.App.4th at p. 1377.) As reflected in the probation report, he was employed at a shipyard before his arrest receiving approximately $1,600 per month, and he had worked at various places prior to that.

applicable to defendants who have suffered a prior serious felony conviction. (Stats. 2018, ch. 1013, §§ 1-2.)

Dunn and the Attorney General agree that if Dunn's case is not final on January 1, 2019, Senate Bill 1393 will apply. (See *In re Estrada* (1965) 63 Cal.2d 740, 744; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) However, the Attorney General argues that in the event the case is decided before January, Dunn's claim is not ripe.

Pursuant to California Rules of Court, rule 8.366(b)(1), this decision will not be final until 30 days after it is filed. Even after the decision is filed, Dunn's judgment will not be final until he has exhausted all his appeal rights. (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306 [judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed].) We therefore remand for resentencing pursuant to sections 667 and 1385, as amended by Senate Bill 1393, after January 1, 2019. We express no opinion on how the trial court should exercise its discretion.

DISPOSITION

The sentence is reversed, and the matter is remanded to allow the trial court to exercise its discretion in determining whether to strike Dunn's five-year enhancement under Penal Code sections 667, subdivision (a)(1) and 1385, as amended effective January 1, 2019.

Upon resentencing, the trial court shall modify the abstract of judgment by striking the erroneous theft fine of $39 pursuant to Penal Code section 1202.5, and imposing and itemizing the following: $10 theft fine (Pen. Code, § 1202.5); $10 penalty assessment

(Pen. Code, § 1464, subd. (a)(1)); $7 penalty assessment (Gov. Code, § 76000, subd. (a)(1)); $2 penalty assessment (Gov. Code, § 76000.5, subd. (a)(1)); $2 state surcharge resulting from 20% of base fine (Pen. Code, § 1465.7, subd. (a)); $5 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)); $1 DNA penalty (Gov. Code, § 76104.6, subd. (a)(1)); $4 DNA state-only penalty (Gov. Code, § 76104.7, subd. (a)). In sum, the abstract of judgment shall reflect a total Penal Code section 1202.5 fine of $41 and itemize the above-referenced penalty assessments and surcharge.

In all other respects, the judgment is affirmed.

GUERRERO, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.